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No. 87-470

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FORT WAYNE BOOKS, INC.,
Petitioner,

v

STATE OF INDIANA, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Indiana

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PHE, INC. IN SUPPORT OF PETITIONER

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October 30, 1987

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

PHE, Inc. hereby respectfully moves for leave to file the attached brief *amicus curiae*. The attorney for petitioner has consented; the attorney for respondent has refused consent.

PHE, Inc. ("PHE") is a North Carolina corporation engaged in the business of mailing throughout the nation various materials protected by the First Amendment, including sexually explicit materials, contraceptives and newsletters. In the past year, PHE has had first-hand experience with the increasing efforts of law enforcement officials to restrict the distribution of sexually explicit speech. PHE was prosecuted in Alamance County, North Carolina for distributing materials that had been cleared by law enforcement officials in adjacent Orange County, North Carolina. The jury acquitted PHE after deliberating for less than one hour. Nevertheless, federal prose-

cutors in North Carolina and Utah have also stated that they are seriously considering prosecuting PHE, and the Utah officials have insisted that to avoid prosecution PHE must discontinue *nationwide* its sale of sexually oriented material, regardless of whether that material is obscene. PHE has substantial reason to believe that this prosecution will include counts based on the federal RICO statute.

PHE wishes to participate in this case to explain the constitutional infirmities of the Indiana RICO statute from the perspective of a national distributor. PHE also wishes to focus on a fundamental constitutional infirmity in the statute which is not fully addressed in the petition: the First Amendment does not permit forfeiture of all of a speech establishment's assets, including thousands of books and magazines that are not alleged to be obscene, based solely on the expressive activities of that establishment. Because the seizure and padlocking at issue here were for the sole and express purpose of facilitating forfeiture of these assets, the unconstitutionality of such forfeiture compels the conclusion that the seizure and padlocking were also unlawful.

For the foregoing reasons, PHE respectfully urges the Court to accept and file the enclosed brief *amicus curiae*.

Dated: October 30, 1987

Respectfully submitted,

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BRIEF AMICUS CURIAE OF PHE, INC. IN SUPPORT OF PETITIONER

INTEREST OF AMICUS

PHE, Inc. ("PHE") is a North Carolina corporation engaged in the business of mailing throughout the nation various materials protected by the First Amendment, including sexually explicit magazines and videotapes, contraceptives, a medical newsletter entitled "Sex Over Forty" (which is edited by a physician), and a newsletter entitled "Executive Health Report." PHE's sexually explicit speech is sent only to adults, and only upon request.

PHE has taken great care to assure compliance with state and federal obscenity laws. The company has requested advice from law enforcement officials in North Carolina and elsewhere, and has met with law enforcement officials, to ensure that no arguably obscene material is distributed by PHE. PHE has strictly abided by the advice it has received.

Despite these efforts, on August 4, 1986, PHE was indicted in Alamance County, North Carolina for the distribution of videotapes and magazines that had been cleared for distribution by attorneys and law enforcement personnel in Orange County, North Carolina (PHE's principal place of business). At trial, a government witness admitted that the materials at issue entered Alamance County (which is a conservative, rural community) only after a law enforcement official obtained a post office box and requested those materials. After less than an hour of deliberation, the jury acquitted PHE of all charges.

Notwithstanding the jury's verdict in this state prosecution, federal prosecutors in North Carolina and Utah have informed PHE that prosecution of PHE under federal obscenity laws is under serious consideration. PHE has substantial reason to believe that this prosecution will include counts based on the federal RICO statute. In pre-indictment negotiations, federal prosecutors in Utah have insisted that to avoid prosecution on felony charges, PHE must discontinue *nationwide* its sale of *any* sexually oriented material, regardless of whether that material is protected by the First Amendment.

In a RICO prosecution, PHE's entire business could be forfeited if PHE is found to have distributed two or more videotapes or magazines that were obscene *in any community* in the United States during the past ten years. The existence of this draconian sanction creates extreme pressure on PHE to accede to the demands of

federal prosecutors that it severely curtail its speech activities in all communities, despite PHE's belief that all of the materials it has distributed are non-obscene and thus constitutionally protected.

As PHE's experience has made it acutely aware, the application of state and federal RICO statutes—which employ "new weapons of unprecedented scope" in order to eradicate the targets of RICO prosecutions, *Russello v. United States*, 464 U.S. 16, 27 (1983)—to expressive activities is fundamentally at odds with the guarantees of the First Amendment.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *United States Marketing, Inc. v. Idaho*, 454 U.S. 1140 (1982), this Court noted probable jurisdiction over an appeal concerning the constitutionality of enjoining a speech business as a nuisance because it had sold obscene materials, but the Court subsequently dismissed that case pursuant to Supreme Court Rule 53. In *Arcara v. Cloud Books, Inc.*, 106 S. Ct. 3172 (1986), the Court ruled 6-3 that application of a nuisance statute to a bookstore was constitutional where this was based *solely* on unlawful sexual activities on the premises and had "nothing to do with books or other expressive activities." 106 S. Ct. at 3178. Justice O'Connor, joined by Justice Stevens, wrote a special concurrence to emphasize that if the statute had been used to "clos[e] down a bookstore because it sold indecent books . . . the case would clearly implicate First Amendment concerns." 106 S. Ct. at 3178.

The government's prosecution in this case raises the substantial question left unanswered in *United States Marketing, Inc.* and *Arcara*. The prosecution does not allege that the three bookstores at issue engaged in any unlawful non-expressive activities, but instead seeks forfeiture of all of their speech materials and business assets because those bookstores sold some obscene books

in the past. Pursuant to an order issued after an *ex parte* hearing, the government has prevented petitioner from distributing lawful speech materials by padlocking petitioner's three bookstores and by seizing their entire contents, *including thousands of books and films that are not even alleged to be obscene.* The prosecutor has filed a petition seeking forfeiture of the bookstores, their contents, and all of petitioner's corporate assets. Appendix to the Petition For a Writ of Certiorari ("Pet. App.") at 35.

The State's action in seizing, padlocking and seeking forfeiture of the assets of these bookstores pursuant to a RICO statute raises extraordinarily important First Amendment questions. Many of these questions have been thoroughly addressed in the petition and will not be discussed here.[1] *Amicus* will focus on an important question that is integral to both the seizure and padlocking issues in this case: whether the First Amendment permits forfeiture of a speech establishment's assets, including constitutionally protected films and books (and proceeds therefrom), based solely on a finding that some of the establishment's expressive activity in the past violated the obscenity standards in at least one community. If the First Amendment does not permit the forfeiture sought

[1] As petitioner explains, the state statute authorizing this mass seizure fails to provide the procedural safeguards required in *Marcus v. Search Warrants, etc.*, 367 U.S. 717 (1961) and its progeny. For example, the statute does not provide for notice or an adversary hearing prior to a mass seizure of speech materials, fails to provide for a prompt and *final* decision (as opposed to a hearing) on the propriety of the seizure and padlocking, and fails to provide prompt appellate review of the lower court's mass seizure and padlocking order. In fact, the Indiana appellate courts failed to rule on petitioner's app[illegible] for a stay of that order for more than a year, and acted [illegible] Justice Stevens, acting as Circuit Justice, ordered respondents [illegible] response to petitioner's stay application.

in this case, then *a fortiori* it is unconstitutional to padlock a bookstore and seize its contents for purposes of eventual forfeiture, even if procedural safeguards are provided. The Indiana Court of Appeals squarely held that the RICO statute's forfeiture provisions violate the First Amendment, Pet. App. 44, 80, but that holding was reversed by the Indiana Supreme Court. *Id.* at 14-15.

The constitutionality of the Indiana seizure, padlocking and forfeiture provisions is an issue of immense importance because the federal government and many state governments have adopted very similar RICO statutes for the express purpose of closing down establishments targeted for prosecution. Those statutes have had precisely that effect on speech establishments in some jurisdictions, and the United States Department of Justice has urged other states to adopt and enforce such statutes against speech establishments. *See, e.g.*, ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, FINAL REPORT 498 (July 1986).

The use of a regulatory mechanism that intentionally silences protected speech because of past obscenity violations in inconsistent with this Court's decisions condemning prior restraints, *Point I*, and its consistent holdings that government regulation of unprotected expression must be narrowly drawn to avoid both direct governmental suppression of lawful speech, and also self-censorship of lawful speech. *Point II.* Indeed, the use of RICO statutes allows the standards of a single community to silence the speech activities of a national distributor like PHE *in all communities*, because the distribution of material deemed obscene in any community can be the predicate for forfeiture of all of that establishment's assets.

ARGUMENT

I. THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE THREATENED FORFEITURE OF THREE BOOKSTORES AND ALL OF THEIR ASSETS, INCLUDING LAWFUL BOOKS AND FILMS, CONSTITUTES AN UNLAWFUL PRIOR RESTRAINT.

In *Near v. Minnesota*, 283 U.S. 697 (1931), this Court said that a central purpose of the First Amendment was to eliminate prior restraints on speech, and held that a "statute must be tested by its operation and effect" to determine whether it imposes such a restraint. 283 U.S. at 708, 713.[2] The "operation and effect" of Indiana's RICO statute, like the federal RICO statute on "which the Indiana statute was patterned," Pet. App. at 10, could not be clearer: both the purpose and effect of RICO statutes is to destroy the economic foundation of targeted businesses, and thereby eradicate those businesses. *Russello*, 464 U.S. at 27. When this "'extraordinary' weapon"[3] is aimed at speech establishments, based solely on a finding that some of their expressive activities have been unlawful, its operation and effect is to prevent those establishments from engaging in other, presumptively constitutional expressive activities.

The penalties provided by RICO (and, in particular, the forfeiture provisions) are expressly designed to "incapacitate" businesses prosecuted under RICO. 116 Cong. Rec. 19855 (1970) (remarks of Sen. McClellan). Although the original purpose of this powerful weapon was to "eradicat[e] organized crime in the United States," *United States v. Turkette*, 452 U.S. 576, 589 (1981), the

[2] *See, e.g., Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *Vance v. Universal Amusement Co.*, 445 U.S. 308, 315 n.13 (1980); *Organization for a Better Austin v. Keefe*, 402 U.S. 414, 418-19 (1971); *Carroll v. Commissioners*, 393 U.S. 175, 181 & n.5 (1968).

[3] *Russello*, 464 U.S. at 27 (quoting Senator Hruska).

reach of the federal and state RICO statutes is far broader and permits RICO prosecutions against any speech business which has violated state or federal obscenity laws on at least two occasions.[4] As applied to speech establishments, the Indiana RICO statute is *not* limited to disabling the business from disseminating only specific expressive works previously found to be unprotected, or even unprotected expression in general. The plain purpose of RICO in this context is to completely shut down speech establishments if they have engaged in two or more unlawful speech activities in the past. Thus, the inevitable effect of RICO, as applied to speech establishments, will be to disable them from disseminating even lawful expression.

This purpose and effect was expressly recognized in the Meese Commission's Report on Pornography, which urged states to adopt and enforce RICO statutes precisely because they provide "an effective means to *substantially eliminate*" businesses that engaged in some unlawful speech in the past. ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, FINAL REPORT 498 (July 1986) (emphasis added). *See also id.* at 464 (enforcement of forfeiture provisions "could literally put [such enterprises] out of business"). A recent *Wall Street Journal* article reports that 12 states now "list obscenity as a crime that can be prosecuted under their RICO laws." Wall St. J., Aug. 25, 1987, at 25. Because of the nature and severity of RICO penalties, law enforcement officials in these states can use prosecutions, or even the threat of RICO prosecutions, to "eliminate" speech establishments. Law enforcement officials in Fort Lauderdale and Orlando, Florida have already successfully used that

[4] *See generally Sedima, S.P.R.L. v. Imrex Co.*, 87 L.Ed.2d 346, 377 (1985) (Powell, J., dissenting) ("RICO has been interpreted so broadly that it has been used more often against respected businesses with no ties to organized crime, than against the mobsters who were the clearly intended target of the statute.").

state's RICO statute to close down bookstores because of their expressive activities. *Id.*

In *Near*, this Court squarely held that where a statute had the purpose, or the operation and effect, of suppressing lawful expression, the statute violated the First Amendment. 283 U.S. at 711-15. In both purpose and effect, the nuisance abatement statute at issue in *Near* and the RICO statute at issue here are remarkably similar. The "reason for the enactment" challenged in *Near* was Minnesota's determination that traditional "prosecutions to enforce penal statutes for libel do not result in 'efficient repression or suppression'" of libelous speech. 283 U.S. at 711. The reason for the enactment of the RICO statute at issue here was Indiana's determination that traditional prosecutions to enforce penal statutes for obscenity were not efficiently repressing or suppressing obscenity. Accordingly, in *Near*, the State of Minnesota had decided that instead of prosecuting individual criminal libels as they occurred, Minnesota would authorize the abatement of the "business" or economic base from which those libels had emanated. 283 U.S. at 17. Similarly, Indiana has decided that instead of prosecuting individual obscene materials as they occur, Indiana will authorize the forfeiture (and thus closure and abatement) of the "enterprise" or economic base from which those obscene materials emanated. In *Near*, the Court ruled that "[c]haracterizing the publication as a business and the business as a nuisance does not permit an invasion of the constitutional immunity against restraint." 283 U.S. at 20. *Near* thus holds that government cannot constitutionally authorize closure of a speech business simply because that business has engaged in unlawful speech in the past. As applied to expressive activities, RICO statutes are specifically designed to close down speech establishments solely because they engaged in unlawful speech in the past. Accordingly, the judgment of the Indiana Supreme Court that Indiana's RICO statute is constitutional is directly inconsistent with this Court's

holding in *Near*. *See* S. Ct. R. 17.1(c) (important consideration favoring grant of certiorari is state court's resolution of "a federal question in a way in conflict with applicable decisions of this Court").

In fact, the prior restraint upheld by the lower court is far more suppressive than the restraint at issue in *Near*, because Indiana would effectively terminate *all* speech activities (lawful or otherwise) by the speech establishments it prosecutes, while the injunction in *Near* only restrained the defendants from publishing "a malicious, scandalous or defamatory newspaper, as defined by law." 283 U.S. at 706. *See also Vance*, 445 U.S. 308 (holding that injunction against use of premises for "commercial manufacturing, commercial distribution, or commercial exhibition of obscene material" pursuant to state nuisance statute was an unconstitutional prior restraint on speech).

Notwithstanding the Court's decisions in *Near*, *Vance* and other prior restraint cases, many states continue to bring civil nuisance actions, and more recently criminal RICO actions, against speech businesses in an effort to terminate all of their speech activities solely because they have engaged in unlawful expressive activities in the past. Although a very substantial majority of lower courts has found such actions unconstitutional,[5] a few courts have upheld their constitutionality.[6] The Court should therefore grant certiorari because "a state court of last resort has decided a federal question in a way in conflict with the decision of" many other state courts of last resort and also "a federal court of appeals." S. Ct. R. 17.1(c).

In addition to the importance of settling this conflict between and among different state and federal jurisdic-

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[5] See the cases collected in the Petition at 21-22 n.4.

[6] *See, e.g., Fehlhaber v. State*, 675 F.2d 1365 (4th Cir. 1982); *Western Business Systems, Inc. v. Slaton*, 492 F. Supp. 513 (N.D. Ga. 1980); *State ex rel. Kidwell v. U.S. Marketing Inc.*, 102 Idaho 451, 631 P.2d 622 (1981).

tions, the issue raised here is of growing importance because law enforcement officials are increasingly invoking closure and forfeiture sanctions against speech establishments. Indeed, as *amicus* will explain, the mere threat that these sanctions may be invoked substantially chills constitutionally protected speech. In these circumstances, it is essential that this Court grant review to determine whether the First Amendment permits such "extraordinary weapons" to be aimed at speech establishments based solely on their expressive activities. S. Ct. R. 17.1 (c) (important reason favoring grant of certiorari is highest state court's resolution of "an important question of federal law which has not been, but should be, settled by this Court").

II. THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE INDIANA STATUTE IS NARROWLY DRAWN TO AVOID DIRECT GOVERNMENTAL SUPPRESSION OF LAWFUL SPEECH, AND ALSO SELF-CENSORSHIP OF LAWFUL SPEECH.

The Court has consistently stressed that because "the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed or punished, is finely drawn. . . . [t]he separation of legitimate from illegitimate speech calls for sensitive tools." *Speiser v. Randall*, 357 U.S. 513, 525 (1959). In particular, statutes regulating speech "must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression." *Gooding v. Wilson*, 405 U.S. 518, 522 (1972). Accordingly, this Court has required that statutes regulating obscenity be narrowly drawn to avoid both direct governmental suppression of lawful speech, and also self-censorship of lawful speech.[7]

[7] *See, e.g., Miller v. California*, 413 U.S. 15, 24 (1973) ("statutes designed to regulate obscene material must be carefully limited");

The forfeiture remedy of the Indiana RICO statute plainly violates both of these constitutional requirements. Rather than being carefully limited to unlawful speech, or to the proceeds from unlawful speech, the statute also authorizes forfeiture and thus direct suppression of speech materials that are not alleged to be obscene or otherwise unprotected—books, videotapes, magazines, bookcases, projectors and other assets used to distribute and exhibit protected speech—and proceeds from the sale of protected speech. In this case, the State seeks forfeiture of thousands of books and films without even alleging that they are obscene. In short, the direct consequence of this statute is suppression of an extraordinary amount of constitutionally protected speech.[8]

In addition to this direct governmental suppression of protected speech, RICO statutes are certain to cause self-censorship of a substantial amount of protected speech. RICO makes the sale of even small quantities of obscene material a "poison pill." If a business sells any obscene material, all of the assets of that business are

Carroll, 393 U.S. at 183-84 ("An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order."); *Bantam Books v. Sullivan*, 372 U.S. 58, 66 (1963) (regulation of obscenity must "conform to procedures that will ensure against the curtailment of constitutionally protected expression"); *Smith v. California*, 361 U.S. 147, 152, 155 (1959).

[8] The Indiana Supreme Court's view that such protected materials could be forfeited, like other "contraband," simply because of their association with unprotected speech, regardless of whether forfeiture has the effect of suppressing protected speech, is in direct conflict with the principles adopted in this Court's prior decisions. These cases recognize that speech, unlike other "contraband," is entitled to special protection to assure that constitutionally protected speech is not suppressed. *See, e.g., Marcus v. Search Warrant of Property*, 367 U.S. 717, 730-31 (1961); *A Quantity of Books v. Kansas*, 378 U.S. 205, 211-12 (1964); *cf. Vance*, 445 U.S. at 315-16.

jeopardized, as well as the assets of any related business entities (subsidiaries, parent corporations, nonprofit corporations, etc.). Because of the "dim and uncertain line" separating protected speech from obscenity, many speech businesses (including businesses that engage in some speech activities and some other activities) will not place all of their corporate assets at risk by distributing any materials that could even conceivably be found obscene in any community. For speech businesses, the only sure way to eliminate the risk of forfeiture under RICO is to cease distributing any sexually explicit speech.

As a national distributor of many products, including some sexually explicit materials, *amicus* is acutely aware of the risks that RICO statutes create when obscenity is included as a predicate offense. Under the federal RICO statute, for example, PHE could be subject to forfeiture of its entire nationwide business merely because in two isolated instances in any community (or communities) in the United States, a magazine or videotape PHE distributes is found to violate local obscenity law. Given the wide variety in temperament and outlook among the thousands of communities in this nation, a distributor such as PHE cannot possibly discern or predict community values for every location from which it receives a request to ship sexually explicit materials. PHE's recent experience in North Carolina illustrates this problem. Following prosecutorial advice about particular speech materials in one county did not shield PHE from a prosecution in an adjoining county (initiated after law enforcement officials surreptitiously requested that this material be mailed into that county) based on the very same materials. Because of the inherent difficulties of complying with varying community standards across the nation, a prudent nationwide distributor can only avoid the risk that its business will be closed down under a state or federal RICO statute by limiting distribution

to expression that poses *no* risk of offending the standards of *any* community.

The draconian approach employed in RICO statutes thus pressures distributors to censor their speech nationally in order to satisfy the standards of the least tolerant communities. It also gives local communities a powerful tool to compel that result. By showing that a speech establishment has twice distributed obscene materials in its community, a community can use a RICO prosecution to forfeit—to that community—all of the proceeds of that establishment's sale of *lawful* materials in other communities, and can effectively shut down further speech activities by that business in all communities.[9] For these reasons, the forfeiture remedy in RICO statutes is in direct conflict with the principle, if not the holding, in *Miller* that obscenity law should accommodate the varying tolerance levels of diverse communities. *Miller v. California*, 413 U.S. 15, 30, 32 (1973).[10] *See* S. Ct. R. 17.1(c).

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[9] This is true even if the two materials found obscene in the community where a prosecution is commenced would be found not obscene and thus constitutionally protected in other communities.

[10] The danger that particularly intolerant communities can use RICO's extreme penalties to impose their standards on other communities is not chimerical. As explained *supra*, backed by the force of the federal RICO statute, federal prosecutors in Utah have insisted that PHE discontinue the sale of any sexually explicit materials anywhere in the nation. Furthermore, under the federal RICO statute, federal prosecutors can pre-determine the least tolerant community in America, can surreptitiously solicit the mailing to that community of sexually explicit materials they know would be tolerated in every other community, and can then use these solicited mailings to prosecute under RICO and obtain the forfeiture of the business' entire inventory and the proceeds of all of its lawful sales to other communities. As explained earlier, the prosecution of PHE in rural Alamance County, North Carolina, was based on materials that had been surreptitiously requested by a law enforcement official there.

CONCLUSION

For the foregoing reasons, *amicus* urges this Court to grant the petition for certiorari.

Respectfully submitted,

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